

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THEODORE HAROLD NOVAK,

Defendant-Appellant.

UNPUBLISHED

March 1, 2007

No. 265783

Genesee Circuit Court

LC No. 04-014768-FC

Before: Borrello, P.J., and Jansen and Cooper, JJ.

PER CURIAM.

In this case, defendant was initially charged with armed robbery, MCL 750.529, felon in possession of a firearm, MCL 750.224f, carrying a concealed weapon, MCL 750.227, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant pleaded guilty to armed robbery in exchange for a dismissal of the remaining charges and the prosecutor's agreement to forgo sentence enhancement as a habitual offender. The trial court sentenced defendant to 120 to 300 months in prison. This Court denied defendant's application for leave to appeal, but our Supreme Court subsequently remanded the case to this Court for consideration as on leave granted, directing this Court to consider three questions. *People v Novak*, 474 Mich 883; 704 NW2d 701 (2005). Our Supreme Court instructed us to consider the following questions: "(1) whether defendant's use of a toy gun to commit the armed robbery is accounted for by the sentencing guidelines, MCL 777.31, (2) whether the facts of this case constitute substantial and compelling reasons to depart from the sentencing guidelines range, and (3) if so, whether the extent of the trial court's departure was justified by those reasons." *Id.* We remand for articulation of substantial and compelling reasons for departing from the guidelines range or for resentencing.

The probation department originally assessed 15 points for offense variable (OV) 1, MCL 777.31, and five points for OV 2, MCL 777.32. However, the trial court reduced both scores to zero, finding that:

I think we're going to zero that out and the reason I'm doing that is because I looked up in the weapon section of the jury instructions, definition of a pistol. It says a pistol is a firearm, and then goes on and says, a firearm includes any weapon from which a dangerous object can be shot or propelled by use of explosives, gas or air. And if this was a rubber band gun that doesn't use explosives, gas or air, so we will zero it.

Despite its scoring of zero points for OV 1 and OV 2, the trial court deviated from the guidelines of 51 to 85 months and sentenced defendant to imprisonment for 120 to 300 months. The trial court articulated the following reasons for departing from the guidelines:

[T]he guidelines do not define a firearm to include a toy pistol. The guidelines do not contemplate a victim being apprehensive and fearful after believing it was a real pistol, and being threatened by words as you said or as the victim believes you said which were, ‘If you don’t hit the floor I am going to shoot.’

The interpretation and application of the statutory guidelines present questions of law that are reviewed de novo on appeal. *People v Johnson*, 474 Mich 96, 99; 712 NW2d 703 (2006). MCL 777.31(1) provides the scores to be assessed for “aggravated use of a weapon.” It provides for the following scores:

(a) 25 points where a firearm was discharged at or toward a human being or a victim was cut or stabbed with a knife or other cutting or stabbing weapon;

* * *

(c) 15 points where a firearm was pointed at or toward a victim or the victim had a reasonable apprehension of an immediate battery when threatened with a knife or other cutting or stabbing weapon;

(d) 10 points where the victim was touched by any other type of weapon;

(e) 5 points where a weapon was displayed or implied;

(f) 0 points where no aggravated use of a weapon occurred.

The guidelines do not define the term “firearm.” However, the Legislature has defined words and provided definitions which apply to all statutes absent some indication to the contrary. Specifically, MCL 8.3 provides:

In the construction of the statutes of this state, the rules stated in sections 3a to 3w shall be observed, unless such construction would be inconsistent with the manifest intent of the legislature.

MCL 8.3t provides as follows:

The word “firearm”, except as otherwise specifically defined in the statutes, shall be construed to include any weapon from which a dangerous projectile may be propelled by using explosives, gas or air as a means of propulsion, except any smooth bore rifle or handgun designed and manufactured exclusively for propelling BB’s not exceeding .177 caliber by means of spring, gas or air.

MCL 777.31(1)(c) only applies to the pointing of a firearm, and a toy or fake gun does not meet the statutory definition of a firearm. A further indication that § 31(1)(c) was meant to apply only to a statutorily-defined firearm is that § 31(1)(e) provides for the assessment of five

points where “[a] weapon is displayed or implied,” and § 31(2)(c) instructs that the five-point score applies “if an offender used an object to suggest the presence of a weapon.” MCL 777.31(2)(c). However, the instructions also provide that five points are not to be scored if the sentencing offense is a violation of MCL 750.529. MCL 777.31(2)(e). Therefore, while use of a toy or fake gun may warrant a five-point score under other circumstances, it does not warrant a five-point score where, as here, the sentencing offense is armed robbery.¹ We therefore concur with the trial court’s scoring of zero points for OV 1 and OV 2 and conclude, in response to the first question presented to us by our Supreme Court, that defendant’s use of a toy gun to commit armed robbery is not accounted for by the sentencing guidelines, MCL 777.31.

The Supreme Court also directed this Court to consider “whether the facts of this case constitute substantial and compelling reasons to depart from the sentencing guidelines range, and . . . if so, whether the extent of the trial court’s departure was justified by those reasons.” *Novak, supra*.

Our Supreme Court has stated that “the Legislature intended ‘substantial and compelling reasons’ to exist only in exceptional cases.” *People v Fields*, 448 Mich 58, 68; 528 NW2d 176 (1995). Only objective factors that are capable of verification may be used to assess whether there are substantial and compelling reasons to deviate from the minimum sentence range under the guidelines. *People v Babcock*, 244 Mich App 64, 75; 624 NW2d 479 (2000). Objective and verifiable factors are “actions or occurrences that are external to the minds of the judge, defendant, and others involved in making the decision, and must be capable of being confirmed.” *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). A trial court may depart from the guidelines if it “has a substantial and compelling reason for that departure and states on the record the reasons for the departure.” MCL 769.34(3). Further, a departure is appropriate “if there are substantial and compelling reasons that lead the trial court to believe that a sentence within the guidelines ranges is not proportionate to the seriousness of the defendant’s conduct and to the seriousness of his criminal history,” such that a departure would result in “a more proportionate criminal sentence than is available within the guidelines range.” *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003).

The trial court’s determination regarding the existence of a reason or factor warranting departure is a factual determination that is reviewed on appeal under the clearly erroneous standard. The determination that a particular factor is objective and verifiable is reviewed by this Court as a matter of law. The trial court’s determination that objective and verifiable factors present a substantial and compelling reason to depart from the statutory minimum sentence is reviewed for an abuse of discretion, which “occurs when the trial court chooses an outcome falling outside the permissible principled range of outcomes.” *Id.* at 273-274.

¹ However, we note that while a toy or fake gun does not warrant the scoring of points under OV 1 or OV 2, pointing a toy or fake gun at a victim has the singular purpose of causing the victim to perceive that the perpetrator is brandishing a lethal weapon, therefore allowing the defendant to accomplish the same results and same level of fear as if a real weapon had been used.

Once the court has a valid basis for departing from the guidelines, the reasons cited by the court must justify the particular departure. *Id.* at 272-273; *People v Hegwood*, 465 Mich 432, 437 n 10; 636 NW2d 127 (2001). In other words, the extent of the departure must be proportionate to the seriousness of the circumstances surrounding the offense and the offender. *Babcock*, *supra* at 264. “The amount a trial court departs from the guidelines is reviewed to determine whether the trial court abused its discretion.” *Abramski*, *supra*.

In this case, the trial court’s sentence constituted an upward departure of 35 months. The trial court asserted that its rationale for departing from the guidelines was that the guidelines failed to take into account the use of a fake or toy gun, even though the victim’s perception in terms of the threat posed to his life was the same as if defendant had used a real gun. The fact that defendant used a toy gun and the impact of a defendant’s use of a toy gun on a victim are objective and verifiable facts that were not taken into account by the guidelines. However, the trial court’s articulation of the fact that defendant used a toy gun, by itself, is not sufficient to justify the upward departure in this case because even if the guidelines did take into account defendant’s use of a toy gun and defendant had been assessed 15 points under OV 1 for pointing a real gun at the victim, it would not have changed the minimum guidelines range. Therefore, we conclude that the trial court was required to articulate substantial and compelling reasons, beyond defendant’s use of a toy gun, to warrant the upward departure. We observe that it appears the trial court properly recognized its duty to articulate substantial and compelling reasons to justify its departure from the guidelines range. However, believing, quite correctly, that the guidelines failed to take into account defendant’s use of a toy gun, it articulated only that reason as justification for the upwards departure. There may very well be additional substantial and compelling reasons to justify the upwards departure, and the trial court will have the opportunity to articulate those reasons, if they exist, on remand.

In sum, our responses to the questions our Supreme Court directed us to address are as follows. First, we find that the sentencing guidelines do not take into account the use of a toy gun to commit armed robbery. Second, we conclude that in this case, the fact that defendant used a toy gun, by itself, is not substantial and compelling enough to warrant a departure from the guidelines range because even if defendant had received a score of 15 for OV 1, it would not have increased the guidelines range. However, on remand, the trial court shall have the opportunity to articulate additional substantial and compelling reasons to justify a departure from the guidelines range. Third, we hold that the fact that defendant used a toy gun alone is not sufficiently substantial and compelling to justify the extent of the upward departure in this case given the fact that defendant’s guidelines range would have been the same even if he had been scored under OV 1 as if he possessed a real gun. Again, however, the trial court may, on remand, articulate additional substantial and compelling reasons to justify the extent of the upward departure.

Reversed and remanded for articulation of substantial and compelling reasons for the upward departure from the guidelines range or for resentencing.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Jessica R. Cooper